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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 661

JESSIE MAROY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CHARLES B. EVINS,
12 W. Garfield Blvd., Suite 200,
Chicago 9, Illinois,
DRexel 3-3600,
Attorney for Petitioner.

R. EUGENE PINCHAM,
Of Counsel.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, JESSIE MAROY, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on January 11, 1957, and is not reported but appears in the record filed with and certified by the Clerk of the Court of Appeals and transmitted herewith.

The opinion the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed October 17, 1957, and is not yet reported but is set forth in the Appendix hereto and in the certified copy of the Record.

JURISDICTION.

On November 13, 1957, it was ordered that the petition for rehearing be denied. (These orders appear in the Appendix), This petition is filed within thirty (30) days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. Where a statute (Section 4704(a), Title 26, U.S.C., 68 Stat. 1004) provides that, "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; *and the absence of* appropriate tax paid *stamps from narcotic drugs shall be prima facie evidence of a violation* of this subsection *by the person in whose possession the same may be found,*" (Emphasis supplied); and where the indictment charges that, "defendants herein, did unlawfully and wilfully purchase from a person . . . a narcotic drug . . . which said heroin . . . was not then and there in the original stamped package, nor from the original stamped package:" is the statutory provision that possession of the drug is *prima facie* evidence of a violation of the statute by the person in whose possession same may be found, applicable to or operative against a defendant who is not shown to have had possession of the drug; or, can the government rely on the statutory provision that possession of the

drug is *prima facie* evidence of a violation of the statute by the person in whose possession same may be found as to a defendant who is not shown to have had possession of the drug?

2. Where a statute (174T. 21 U.S.C., 65 Stat. 767) provides that "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law," shall be punished; and further that "*Whenever* on trial for a violation of this subsection *the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction* unless the defendant explains the possession to the satisfaction of the jury" (emphasis added); and the indictment charges that, "defendants herein, did then and there fraudulently and knowingly receive, conceal, buy, and facilitate the transportation and concealment after importation of a narcotic drug, . . . knowing the same to be imported into the United States contrary to law;" is the statutory provision that possession of the drug by the defendant shall be deemed sufficient evidence to authorize conviction of the defendant who is shown to have had possession of the drugs, applicable to, or operative against a defendant who is not shown by the evidence to have had possession of the drugs; or, can the government rely on the statutory provision that possession of the drug by the defendant shall be deemed sufficient evidence to authorize conviction of said defendant, without evidence that said defendant had possession of the drug?

3. Where Jessie Maroy, petitioner herein, was jointly indicted with one Edward Minor for having unlawfully purchased narcotic drugs not in or from the original stamped package in violation of Section 4704(a), Title 26, United States Code, and for having unlawfully concealed said drugs in violation of Section 174, Title 21, United States Code, was it error to submit to the jury instructions on Maroy aiding Minor in the latter's possession of the drug where there was no evidence that Maroy so aided Minor in his possession thereof?

4. Where petitioner is charged with having conspired with one Edward Minor to violate the narcotic laws of the United States in violation of Section 371, Title 18, U.S.C., was it error to refuse to enter judgment of acquittal of petitioner, where the evidence failed to establish the alleged conspiracy?

STATEMENT OF THE CASE.

Count One of the indictment charged that petitioner, JESSIE MAROY, and one Edward Minor on May 10, 1956, at Chicago, Illinois, unlawfully purchased a narcotic drug, which drug was not then and there in the original stamped package, nor from the original stamped package, in violation of Section 4704(a), Title 26, United States Code.

Count Two charged that Petitioner and Edward Minor on May 10, 1956 at Chicago, Illinois knowingly concealed said drugs, knowing same to have been unlawfully imported into the United States in violation of Section 174, Title 21, United States Code.

Count Twelve charged that said parties at said place, from May 10, 1956 to July 6, 1956, conspired to violate the narcotic laws of the United States in violation of Section 371, Title 18, United States Code.

The trial was had before a jury, on January 2, 3, 4, 7 and 8, 1957. Petitioner's motion for judgment of acquittal as to each Count at the close of evidence was denied on January 4, 1957. The jury returned its verdict on January 8, 1957 finding Petitioner and Edward Minor guilty under the aforesaid Counts. Judgments of guilty was entered thereon, and on January 11, 1957, Petitioner was sentenced to imprisonment for a period of four years and fined $500.00 on each Count, the sentence on Counts One and Two concurrent to each other, and consecutive to the sentence on Count Twelve and the fines cumulative, Petitioner to stand committed until fines paid. Petitioner's motion for a new trial was overruled.

EVIDENCE.

The evidence presented by the government is as follows:

On the afternoon of May 10, 1956, in the vicinity of Hoyne and Madison Streets, Agent Gjertsen and Special Employee Thomas L. Cross saw the defendants alight from a Pontiac automobile, having been driven by the Petitioner, Maroy (A. 17-18). Cross waved to Petitioner and Minor and they crossed the street to where Gjertsen and Cross were standing. After greetings were exchanged, Cross stated to Petitioner that he had a friend with him (A. 109). Cross and Petitioner stepped over to the side out of the hearing of Minor and Gjertsen. Cross told Petitioner that his friend wanted to set him up in business to which Petitioner replied, "I don't do no business with no grays (meaning Caucasian), so if you want to talk about it, you have got to see my man." Petitioner and Cross then stepped back into the presence of Minor and Gjertsen. Gjertsen then said to Petitioner that he wanted to do some business and Petitioner told Gjertsen what he had just previously told Cross. Petitioner said nothing to Minor, nor Minor to him, nor did Cross and Gjertsen say anything to Minor in Petitioner's presence. Petitioner left Minor, Cross and Gjertsen and proceeded east to an all night food store located approximately a block away, (A. 56). Cross nor Gjertsen saw Petitioner again that day. Cross had never dealt with nor bought anything from Petitioner (A. 128-123).

Cross, Gjertsen and Minor engaged in conversation in which Cross and Gjertsen agreed to buy narcotics from Minor. Minor left and where he went and to whom, if anyone, he talked from the time he left up to the time they next saw him, Cross and Gjertsen did not know (A. 69). Cross and Gjertsen proceeded to a tavern and about twenty minutes thereafter, Minor entered. Cross

gave Minor $60.00 and Minor gave Cross a package, later identified to be heroin. Minor left the tavern and drove off in a Plymouth automobile.

On May 22, 1956, Cross and Agent Turnbou saw Petitioner, Minor and an unidentified female standing on a corner. Cross went over to where they were and stated to Petitioner that he had a friend with him that wanted to do some business. Petitioner said, "You know I don't do any business. See my man." Cross had no further conversation with Petitioner (A. 162). Minor and Cross had a conversation after which Cross returned to the tavern which Turnbou had entered. Cross and Turnbou, upon leaving the tavern, saw Petitioner and the lady still standing on the corner talking. Minor was driving away alone in a car. Cross and Turnbou proceeded to an alley. Turnbou did not see Petitioner again (A. 214).

Gjertsen saw Minor park the car and enter an apartment building located on Sacramento between Washington and Warren. About ten minutes later, Minor left the building and joined company with Cross and Turnbou in the alley, where Minor delivered a package to Turnbou and Turnbou gave Minor some money (A. 125). Turnbou did not know where Minor was or with whom he spoke up to the time he saw him in the alley.

Minor returned to the automobile and proceeded to the vicinity of Madison Street and parked the car. Minor got out of the car and walked across the street to where Petitioner was. He and Petitioner engaged in conversation. Minor and Petitioner left the vicinity in the automobile.

On July 5, 1956, Gjertsen saw Petitioner and Minor coming out of the building located at 110 N. Wood Street. They entered a Chevrolet automobile and left the vicinity.

Petitioner drove the car (A. 37). At Hoyne Street, Minor got out of the car and proceeded west on foot to the corner of Hoyne. Petitioner left the vicinity, and Petitioner nor the Chevrolet automobile, were seen again that day (A. 100). Minor walked up to Turnbou and engaged him in conversation. Turnbou then entered a restaurant. Minor disappeared on foot. Turnbou remained in the restaurant for about an hour, left and proceeded to his automobile (A. 192), and after entering same, Minor drove up in an old Plymouth. Turnbou got out of his car and entered Minor's car. Minor drove to a tavern which he and Turnbou entered and had refreshments. While there (A. 193), Minor engaged in conversation with a female. Minor, the female and Turnbou left the tavern, and in the Plymouth driven by Minor, proceeded to another tavern, which the three of them entered. Later, Minor and the female left Turnbou in the tavern. When they returned, Turnbou gave Minor some money, and the female gave Turnbou the package. Minor left the tavern alone.

The money that Turnbou gave Minor on the early morning of July 6, 1956 had been given to Turnbou by Gjertsen. Gjertsen had processed it, tested it with phosphorescent powder and listed all the serial numbers (A. 279). When Gjertsen arrested Petitioner about noon on July 6, Gjertsen took some money from Petitioner. Gjertsen processed it with a blue light, checked the serial numbers and returned it to Petitioner. The serial numbers on the bills in Petitioner's possession were not the same serial numbers of the bills that Gjertsen had given to Turnbou (A. 380).

Petitioner's evidence was that:

Petitioner, 41 years of age, resided at 3251 West Washington Boulevard, Chicago (A. 250). He is a partner in

a tavern located at 1612 South Kedsie and had been engaged in this business for about ten months; prior thereto, he owned a tavern at 114 South Paulina, for approximately three and a half years. Prior to becoming engaged in the tavern business at 114 South Paulina, he was employed at the Woodall Industries (A. 251), located at 3500 on Oakton, in Skokie, Illinois. He was a masonite inspector there for three years.

He became engaged in the tavern business at 1612 South Kedzie about March, 1956, when he went out of business at 114 South Paulina. He has never been convicted of any crime.

Petitioner first met Thomas Cross about a year ago in the tavern at 114 South Paulina, at which time he was the owner thereof (A. 252). Cross was using vile words and Petitioner had to put him out of the tavern (A. 253). About three weeks later, Cross was again in the tavern at 114 South Paulina and Petitioner again had to put him out. Petitioner took a knife from Cross, who was again using vile and profane words to a customer (A. 255). Cross was talking loud, using vile and profane words. Petitioner called the police and before the police arrived (A. 256), he told Cross if he would not come back into the tavern, Petitioner would let him go. Petitioner kept the knife and turned Cross loose.

Petitioner has an automobile but has trouble with his left eye and could not see so well out of it, which interferes with his driving ability.

Petitioner knows Edward Minor (A. 257), and has known him for approximately five years. About sixteen months previous, he hired Minor to tend bar at his tavern on Paulina, and Minor was tending bar there when Peti-

tioner went out of business. When he moved the tavern to 1612 South Kedzie, he kept Minor with him as a bar porter (A. 257), at a salary of $60.00 a week. Jack Wood, who resides at 3508 South Prairie Avenue, is his partner in the Kedzie Avenue tavern. Riley, who has offices in the 3600 block on West 16th Street, is the bookkeeper for the tavern. The bookkeeper comes in once a month (A. 258).

Minor drove his automobile because Petitioner did not care to drive too much himself and did not trust himself to drive much.

On May 10, 1956, Petitioner picked up Minor at his home. Minor was living in a hotel in the 1900 block on Warren (A. 259). Petitioner and Minor went to the 1000 block on Madison to pick up some glasses. Minor did the driving. They arrived in the 1000 block on West Madison Street between the hour of 3:30 and 4:00 P.M. When they left there they went to Hoyne and Madison. When Petitioner got out of the car, he saw Tommy Cross. Cross said to Petitioner, "I want to talk to you." (A. 262). Petitioner recognized Cross as being the same individual he had put out of the tavern at 114 S. Paulina Street, and Petitioner said to him, "You know you can't talk with me." Petitioner proceeded to walk to the tavern located on the corner and talked to a man by the name of Jack Flagg, the owner.

Since Minor's employment by Petitioner, Petitioner has given Minor permission to drive his automobile (A. 264). Minor would pick up stock and change and take it to the tavern, usually every day.

When Petitioner left the tavern after talking to Jack Flagg, he went to his car and drove to work.

Petitioner did not observe where Minor went or what he was doing. Petitioner did not again see Cross until January 2, 1957 in Court.

On July 5, 1956, Petitioner saw Minor at or about 8:30 or 9 o'clock. Petitioner had a sister who resided at 111 N. Wood named Mary Smith. On that day, Petitioner went to her apartment. Minor was there also. Minor and Petitioner left Petitioner's sister's home together. Petitioner did not know who Minor had been talking to prior to leaving 111 N. Wood Street, and had no knowledge that Minor had talked to Turnbou or to Cross, or to Gjertsen. Minor left in the car with him. Petitioner went to work. Minor got out of the car at Hoyne and Madison Streets where Minor asked to be dropped off. Petitioner had no knowledge with whom, if anyone, Minor spoke after getting out of the car. Petitioner did not go back and had no knowledge of Minor giving any package to anyone and had no knowledge of Minor having a conversation with Turnbou on May 22 or July 5, 1946, and did not see Turnbou on May 22 or July 5, 1956. He had no knowledge of the matters and things about which the Government's witnesses testified concerning money given to Minor, and packages given by Minor to Cross, Turnbou or Gjertsen.

Petitioner was arrested about 1:30 or 2:00 P.M. on July 6, 1956 by Officer Gjertsen (A. 268). When Gjertsen arrested Petitioner, he asked his name, and Petitioner told him. Gjertsen handcuffed Petitioner and told him he was under arrest. Petitioner asked him what for. Gjertsen said: "Come on, you'll find out," and took Petitioner to his home at 3251 W. Washington. Petitioner did not then know where Minor was. When Gjertsen arrived with Petitioner at his home, Gjertsen asked Petitioner how

much money he had. Petitioner took his money out and asked Gjertsen why he wanted to know. Petitioner had about $30.00. Gjertsen looked through the money and gave it back to him. He said, "Do you want to give me what you have here?" (A. 270). Petitioner said, "I don't know what you are looking for." Gjertsen said: "Well, we will have to search." Gjertsen searched the house and found nothing. After which Gjertsen asked Petitioner, "Do you want to give me whatever you have in your possession?" Petitioner said, "I don't have anything. I don't know what I am arrested for." Gjertsen said, "Well, we don't have any case on you but we will make one." Gjertsen then took Petitioner to the Office of the Bureau of Narcotics.

Petitioner categorically denies having any knowledge or participation in the commission of the alleged offenses (A. 257, 268-271).

REASONS FOR GRANTING THE WRIT.

I.

The importance of this case lies in the fact that the decision of the Court of Appeals for the Seventh Circuit rendered herein is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit rendered in *Willsman* v. *United States,* 286 Fed. 852, that is, in the latter decision, the court holds that the provision of the statute that possession of the drug is *prima facie* evidence of a violation of the statute by the person in whose possession the drugs are found *is not* applicable to, operative against and cannot be invoked against a defendant who is not shown to have had possession of the drug. In the case at bar, however, the court holds that said statutory provision is applicable to a defendant who *is not* shown

to have had possession of the drug. This important question of federal law has not been, but should be, settled by This Court.

II.

The decision rendered herein is in direct conflict with the decision of the Court of Appeals for the Third Circuit rendered in *United States of America* v. *Marie Moses,* 220 Fed. (2) 166, that is, in the latter decision, the court recognized the distinction between acts committed by a defendant in aid of the buyer in the latter's acquisition of drugs and acts committed by a defendant in aid of the seller in the sale of the drugs; and further recognized that aid by a defendant to a buyer is a separate and distinct offense from aid to the seller, and on facts identical and synonomous to the facts of the instant case, held that the defendant's, Marie Moses', conduct was in aid of the buyer in his acquisition of the drugs, and she, therefore, was not guilty of aiding the seller in his disposition of the drugs, for which she was indicted, and reversed the judgment of conviction therefor. In the case at bar, the Court of Appeals for the Seventh Circuit refused to accept the distinction between the offense of aid to the buyer and the offense of aid to the seller; and on facts identical to the facts before the Court of Appeals for the Third Circuit in the *Moses* case, affirmed the judgment of conviction. This important question of federal law has not been, but should be, settled by This Court.

III.

The decision rendered herein is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit rendered in *Morei* v. *United States,* 127 Fed. (2) 827, wherein the defendant, gave an informer the name and address of a source of drugs and pursuant to the defendant's instruction, the informer told the source that the defendant sent him and received drugs from the source. The Court held that such conduct did not bring the defendant within the compass of the crime of aiding the source in his sale of the drugs to the informer and reversed the judgment of conviction therefor. In the case at bar, the Court of Appeals for the Seventh Circuit holds that Petitioner's giving to the informer a source of drugs, from whom the informer obtained drugs, brings Petitioner within the compass of the crime of aiding the source in his sale of the drugs to the informer and affirmed the judgment of conviction therefor. This important question of federal law has not been, but should be, settled by This Court.

IV.

The Court of Appeals below has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision, in that the Court of Appeals below sanctioned the submission of four repetitious instructions to the jury on aiding and abetting involving and predicated upon a single alleged transaction.

ARGUMENT.

I.

Count One of the indictment alleged a violation of Section 4704(a), Title 26, United States Code, which provides:

> "It shall be unlawful for any person to purchase . . . drugs except in the original stamped package or from the original stamped package, . . . "

To prove a violation of this statute, the Government may resort to direct proof and evidence that a defendant did purchase narcotic drugs and then further prove that said drugs were not in or from the original stamped package.

In addition to the method of proving by direct proof and evidence a violation of this section, The Congress of the United States has provided the Government with another means to prove its violation. In so doing, Congress prescribed the condition which must be shown to exist in order for said additional method of proof to become operative and be invoked. It is provided in the aforementioned section:

> "and the absence of appropriate tax paid stamps from narcotic drugs shall be *prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.*" (Italics added).

Congress thereby prescribed and def ed, by clear, concise, definite and unambiguous language, the person against whom a *prima facie* violation is applicable and can be invoked as "the person in whose possession the same may be found." This is a criminal statute creating

a presumption against an accused. It should, therefore, be strictly construed and not extended beyond its expressed limitation. Its language does not permit it to be invoked against an accused who is not shown to have had possession of the drugs. As to such a defendant, to prove a violation, the Government is required to prove that such defendant purchased drugs which drugs were not in or from the original stamped package.

Count Two alleged a violation of Section 174, Title 21, United States Code, which provides:

> "Whoever . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law . . . shall be imprisoned, etc."

Here again the Government may rely on direct proof and evidence to prove a violation of said section; that is, it may directly prove that an accused received drugs, that said drugs were unlawfully imported and that the accused had knowledge thereof, and here again, Congress has provided the Government with an additional method to prove a violation of the section, and has prescribed and defined the pre-requisites that must be shown to exist before such additional method of proof can become operative. Such conditions are:

> "Whenever on trial for a violation of this subdivision *the defendant is shown to have had possession* of the narcotic drug, *such possession shall be deemed sufficient evidence to authorize conviction.* . . ." (Italics added)

Here, also, Congress has confined and limited the application and operation of the presumption of a violation

of the statute to the person who is shown to have had possession of the drug. In the absence of a showing that the defendant had possession of the drug, the Government was required to prove by direct proof and evidence that said defendant concealed drugs, that said drugs were unlawfully imported and that the defendant had knowledge thereof.

The evidence relied on by the Government to sustain its burden of proving the allegations of Count One is the same evidence relied on to prove the allegations of Count Two. The two counts allege the violation of different statutes, but the drugs referred to in the two counts are the same and the alleged violations arose out of the same alleged transaction. In addition thereto, the two statutes are strikingly similar, in that they both create presumptions of their violation by the person in whose possession drugs are found. It is, therefore, suggested that the argument as to either count is applicable to the other.

The Government offered no evidence that the drugs were not in or from the original stamped package, in violation of 4704(a), or that they were received with knowledge of their unlawful importation in violation of Section 174. It relied solely on the aforementioned presumptions of said statutes of a violation thereof, by the person in whose possession drugs are found, and conceded at page 10 of its brief filed in the court below that the evidence failed to show that Petitioner ever had possession of the drugs. It argued that the showing of possession of the drugs by Minor was sufficient and that Minor's possession was sufficient to invoke the presumption of the statutes as to Petitioner, though the latter is not shown to have had possession.

To this argument and on the aforementioned facts, the Court of Appeals below, at Page 4 of the opinion, held:

"We cannot say the jury was unwarranted in finding that the defendant-appellant, Jessie Maroy, (Petitioner) aided and abetted Minor in the illegal transaction and they were acting in concert in the illegal undertaking, (authorities cited), and that the possession of the heroin by Minor was possession by Maroy as well."

This holding by the court below extends and expands the provisions of the statutes that possession of the drugs is *prima facie* evidence of a violation thereof by the person in whose possession the drugs are found beyond the express limitations defined by Congress. This holding applies and invokes said presumption to and against a defendant who is not shown to have had possession of the drug. Congress has expressly confined the application of the presumption of a violation of the statutes to persons in whose possession the drugs are found. For the court below to extend the application of the presumption beyond said Congressional limitations to persons not specified therein, that is, to persons not shown to have had possession, constitutes and is legislation by judicial decree. This is such a far departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

This holding by the Court of Appeals below is diametrically opposed to the holding by the Court of Appeals for the Eighth Circuit in *Willsman* v. *United States*, 286 Fed. 852. The statute alleged to have been violated in the *Willsman* case, and the statute alleged to have been violated in Count One of the indictment of the case at bar are identical. In the *Willsman* case, Anderson, for the Government, testified that he called at Willsman's home and showed him a letter which had been written by R, who was then confined in jail. The letter requested

Willsman to send morphine to R. by Anderson. Anderson told Willsman that he and R were friends; that R wanted morphine badly and had asked him to get it from Willsman. Willsman replied that he would see. This conversation between Anderson and Willsman occurred in the front hall of Willsman's residence. Willsman went to the back part of the house and in about five minutes returned with his hat and coat on, and said, "I have not got any stuff here, but I will go where we can get some." Enroute, Willsman exercised caution not to be detected and stated to Anderson, "I have got to be . . . careful, because they stuck me for this the other day—for selling this stuff." Upon arriving in front of a saloon, Willsman said to Anderson, "You stand here a minute, and I will be back." Willsman entered a house, returned with Grant and said to Anderson, "Give him your dough, and he will get you the stuff." Anderson expressed a reluctance to depart with his money before receiving his wares, but nevertheless gave Grant the money. Whereupon Willsman stated, "We would not cheat the Doc (R), he is one of the best friends I have got," and turning to Grant, said, "Give him back the dough." Grant handed the money back to Anderson and Willsman said to him, "You walk on up the street, and we will catch you." Anderson complied. About a block away, he saw Willsman and Grant come out of an alley and approach him. Willsman said to Grant, "Give him the stuff." Grant handed the package to Anderson and Willsman said, "Now, give him your dough." Anderson gave Grant the $25.00 and departed.

On these facts, a jury found Willsman and Grant guilty of having unlawfully purchased narcotic drugs not in or from the original stamped package. There was no evidence in the record of a purchase of the drugs by either

Willsman or Grant, and so be it in the case at bar. Nor was there any evidence that the drugs were not in or from the original stamped package. The prosecution relied on the provision of the statute which made possession of the drug *prima facie* evidence of unlawful purchase, as does the prosecution in the case at bar.

On appeal, Willsman contended that there was no evidence in the record that the drugs were found, or ever known to have been in his possession, and that the *prima facie* evidence rule created by possession of the drugs could not be invoked against him to sustain the verdict.

In reversing the judgment of conviction of Willsman, the Court stated, pages 855-856:

> "The testimony of the witness, Anderson, which was in substance as above recited, shows that the unstamped package containing the morphine described in the indictment was in the physical possession of the defendant Grant, and was by Grant delivered to the witness at the time the purchase and sale were consummated. *Clearly the rule of evidence established by the act providing that possession shall be prima facie evidence of the violation of Section One of the act was applicable to the defendant, Grant, but under the facts as above recited, can the rule be invoked against the defendant, Willsman?* So far as the record shows, plaintiff in error never had the package in his hands or under his control. The $25.00 paid by Anderson was given to the defendant, Grant, and so far as the record shows the defendant, Willsman, never received or expected to receive any part of it.
>
> " . . . *The question is: Was the possession of Grant the possession of Willsman also?*
>
> *"The general rule is that possession, to be incriminating, must be personal and exclusive . . .*" (Emphasis ours)

The Court proceeded to hold that possession of the drugs by Grant was not the possession of Willsman and therefore the presumption of a violation of the statute or the *prima facie* rule could not be invoked as to the latter.

It is to be noted that the *Willsman* case was decided in 1923 and was a case of first impression, for at page 855, the Court points out that "no decided cases have been called to our attention, and we have found none directly in point upon the question now being considered . . . " Congress, subsequent to and to avoid the *Willsman* holding has not changed, altered or modified the *prima facie* evidence provision of the statute to include persons not shown to have had possession of drugs, and its inaction is indicative that said holding was in harmony with the congressional intent in the enactment of the provision.

Though cited and relied upon by Petitioner in the Court of Appeals below, its opinion neglects to discuss or attempt to distinguish the *Willsman* case from the case at bar. The Government, however, recognized and appreciated the inconsistency between its position in the instant case and the holding of the *Willsman* case, for at page 21 of its brief filed in the Court of Appeals below, it conceded:

> "An analysis of this case (the *Willsman* case) will show that the holding is in conflict with the decisions of this and most other circuits."

And again at page 23 of said brief, the Government conceded:

> "Had the Court of Appeals for the Eighth Circuit followed the rule announced by this and other circuits, the result in the *Willsman* case obviously would have been different."

It is, therefore, respectfully suggested, that the decision of the Court of Appeals below in the case at bar, and the Court of Appeals for the Eighth Circuit in the *Willsman* case are in diametrical conflict.

II.

To enhance its quality of evidence, the Government relied on Title 18, Section 2, which provides:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal."

The impropriety of the application of this statute to the facts of the case at bar as submitted to the jury in the form of instructions is hereinafter discussed. The Government contended that Petitioner aided Minor in the latter's possession of the drugs; that Minor's possession was also the possession of Petitioner and that, therefore, the provision of the statutes providing that possession of the drugs is *prima facie* evidence of a violatiion thereof by the person in whose possession same may be found is operative against and applicable to Petitioner. The legal gymnastics of this contention creates and imposes a presumption on a presumption, that is, the presumption that Minor's possession of the drugs was that of Petitioner's, upon which is then based the further presumption, created by the statute, that such possession was unlawful. The Court of Appeals accepted this contention by holding at page 4 of the opinion:

"We cannot say the jury was unwarranted in finding that the defendant-appellant, *Jessie Maroy, aided and abetted Minor in the illegal undertaking,* (authorities cited), *and that the possession of the heroin by Minor was possession by Maroy as well.*" (Italics added).

The law recognizes the distinction between the sale of drugs and the purchase of drugs and makes the two separate and distinct offenses, the former prohibited by Section 4705(a), Title 26, United States Code, and the latter prohibited by Section 4704(a), Title 26, United States Code.

The question is therefore presented: "Did Petitioner aid Minor in the latter's sale of the drugs to Cross and Gjertsen?" Or, "Did Petitioner aid Cross and Gjertsen in their purchase of the drugs from Minor?" The necessity of resolving this question is occasioned by the fact that if the evidence is that Petitioner aided Cross and Gjertsen, an offense for which Petitioner can be indicted, when the instant conviction is for aiding Minor, Petitioner cannot plead said conviction as a bar to subsequent proceedings brought against him for aiding Cross and Gjertsen. In addition thereto, if the evidence is that Petitioner aided Cross and Gjertsen in their acquisition of the drugs from Minor, then Petitioner's conviction for aiding Minor is unsupported by the evidence. Petitioner's aid to Cross and Gjertsen is a separate and distinct offense from aid to Minor. The necessity, therefore, of ascertaining and determining from the evidence whether Petitioner aided Minor in the latter's sale or whether Petitioner aided Cross and Gjertsen in the latter's acquisition is quite apparent.

The Court of Appeals below refused to recognize and accept this distinction. Cross and Gjertsen sought out

Petitioner. They told Petitioner that they wanted to buy drugs and Petitioner is reputed to have told them that he did not deal with Caucasions, and if they wanted drugs to see his man, Minor, which is categorically denied by Petitioner. Petitioner did not introduce them to Minor or tell or advise Minor to make a sale to them. Petitioner said absolutely nothing to Minor, nor did Cross and Gjertsen engage Minor in conversation in Petitioner's presence. Petitioner departed and subsequently, Cross and Gjertsen engaged Minor in conversation in which they agreed to buy, and Minor agreed to sell, drugs to them, the delivery of which was made to them by Minor approximately thirty minutes later in a tavern. Whether Minor acquired the drugs subsequent to the time that the request for them was made, or whether he had them at the time of the request is not revealed by the evidence. When, where, how or from whom Minor acquired the drugs is not shown. Petitioner was not present when the agreement to sell and buy was made and was not present when the drugs and money were transferred in the tavern, and Petitioner received none of the proceeds. The extent of Petitioner's participation, according to the Government's evidence, in the purchase of the drugs by Cross and Gjertsen from Minor is that Petitioner refused to comply with Cross' and Gjertsen's request and his statement to them to see Minor if they wanted to make a purchase. From these facts, who did Petitioner aid? It is quite apparent that Petitioner's participation, committed at the behest and request of Cross and Gjertsen, the purchasers, that is, informing them of a source for the drugs, was aid to them and not aid to Minor, the seller, to whom Petitioner said absolutely nothing and to whom Petitioner offered no aid in his sale.

The opinion of the Court of Appeals below in refusing to recognize that Petitioner's participation in the alleged transaction was in aid of Cross & Gjertsen, the buyers, and holding that said participation was in aid of Minor, the seller, is in direct conflict with the opinion of the Court of Appeals for the Third Circuit, rendered in *United States of America* v. *Marie Moses,* 220 Fed. (2) 166: Marie Moses was visited at her home by two undercover narcotic agents. They told her they wished to purchase some drugs, and inquired whether she knew where such could be obtained. She told them she did not have any, but Cooper was her supplier, and Cooper would be over shortly, and she would be able to arrange for the agents to get some drugs from him. She also told the agents that they might be able to obtain some drugs from a supplier named Mack. Pursuant to the agents' request, she called Mack's home, but was unable to reach him. Subsequent thereto, Cooper arrived at her home and she introduced the agents to Cooper, and told Cooper that the agents wanted to buy some drugs. Cooper asked her if the agents were all right, and she told him they were, and that she had met them on the avenue on other occasions. The agents told Cooper the amount and kind of drugs they wanted, and they talked price with him in the presence and hearing of Marie Moses. She, however, did not participate in the conversation. The agents and Cooper left the house and later that evening Cooper sold the agents some drugs. Cooper was indicted for the sale to the agents under Sections 2553(a) and 2554(a) Title 26, United States Code.

In connection with Moses' participation in the transaction as above set forth, she was indicted under Title 18, Section 2, United States Code and convicted, in that she allegedly abetted and aided Cooper in the sale to the agents.

On appeal, she contended that the law recognized the distinction between the purchase and sale of drugs, both being separate offenses, and that her participation was performed in aid of the purchaser acquiring the drugs and not in aid of the seller's, Cooper's, sale of them and that she therefore was not guilty of aiding Cooper. The Court agreed with her contention and held, at page 168:

> "In charging a person under Section 2 of Title 18, the Government must select and identify the particular 'offense against the United States,' in which the alleged wrong-doer has participated. Such selection makes a difference in this case because the criminal law characteristically analyzes and deals with traffic in contraband in two distinct aspects. The one aspect is the conduct of the seller; the other, the conduct of the buyer. Either or both may be punished, but the significant fact for present purposes is that the law treats selling and buying as distinct and separate offenses. See Section 2553 and 2554 of Title 26, United States Code. Therefore, a participant in a particular transaction must be punished either as a seller or buyer. There is no general offense of participation in the transaction viewed as a whole.
>
> "The government has chosen to indict Marie Moses for her connection with the crime of selling rather than for any connection with buying. The conviction must stand, if at all, on her relation to the seller and his illicit enterprise. Any relation to the buyer actually militates against conviction of the charged offense of criminal complicity in selling.
>
> "*The undisputed facts show the appellant acting solely at the behest of the prospective buyers and not in their interest.* At the buyers' request, she did two things to facilitate their purchase. *She introduced them to the seller and she vouched for their bona fides,* if purchasers of contraband drugs can be so characterized. *That is all that was proved.* There is

nothing to show that she was associated with the enterprise of the seller or that she had any personal or financial interest in bringing trade to him. *Although appellant's conduct was preparatory to the sale, it was not collaborative with the seller. For this reason, the conviction cannot be sustained.*"

"This conclusion is foreshadowed by our decision in *United States* v. *Sawyer*, 210 Fed. (2) 169, where we required the trial judge in his charge to direct the jury's attention to the necessity of deciding whether an intermediary in a narcotics sale was in fact associated with the selling as distinguished from the buying. In the present case, the evidence clearly falls short of establishing such association. True, Sawyer was indicted as a principal seller and appellant is charged as a seller's helper. But the need of identifying defendant with the selling aspect of the transaction is common to both cases." (Italics added)

And at page 169, the Court held:

"Again in has been a general rule under the prohibition acts, nation and state, that one who has acted without interest in the selling, cannot be connected as a seller, even though his conduct may have facilitated an illegal sale."

Though cited, argued and relied on by Petitioner in the Court of Appeals below, the court in its decision neglects to discuss or attempt to distinguish the *Moses* case from the case at bar.

The decision of the Court of Appeals below is in direct conflict with the decision rendered by the Court of Appeals for the Sixth Circuit in *Morei* v. *United States*, 127 Fed. (2) 827:

The defendants in the *Morei* case were charged under Count One of the indictment with illegal purchase of

drugs; under Count Two, alleged sale, and Count Three, unlawful conspiracy to sell and to purchase the drug. The testimony presented by the Government in support of these allegations was that Beach, an informer, went to Dr. Platt, one of the defendants, and told him that he wanted heroin to "soup" race horses; that he gave the doctor the names of certain races in order that the doctor could bet on them; that the heroin was to be used to stimulate them and to win the races in this manner. *It was claimed that Dr. Platt said that he did not have any heroin, but that he did give the informer the name of defendant, Morei, and his address in Cleveland, and told him to see Morei, and tell him that the doctor had sent him, and that "he will take care of you."*

Defendant Evans was employed as a chauffeur for Morei, who could not drive his car because of bad eyesight. Subsequent to the informer requesting a purchase of drugs from Morei, the informer, Morei and Evans met at a drug store. Morei asked Evans to call Youngstown, which he did, and after Evans got the call through, Morei spoke to someone. After the phone conversation, Morei came out and said: "It's all right," and then told Evans to go to Youngstown. Morei then told the informer to return about six o'clock and he would have the stuff. When the informer returned, he and Morei had dinner and later Evans came in and said to Morei, "No score." Morei and Evans left the table and talked. When they returned, Morei said to the informer, "Come with me and we will get it." The drugs were delivered by defendant Russo to Morei on a dark street. Morei and the informer were driven there by Evans, the chauffeur. After Morei had secured the drugs and given them to the informer in the car, Evans drove them downtown and Morei left the car. The informer and Evans then had a conversation

about heroin. The conviction of each defendant was reversed. The Court held that this evidence was insufficient upon which to base a conviction of Dr. Platt for either the unlawful sale or purchase of drugs or conspiracy to sell drugs. The conviction of Evans was reversed on the ground that the evidence was insufficient to sustain it, and that of Morei was reversed on the ground of entrapment. The Court held at pages 831-832:

> "There was no evidence that Dr. Platt planned with the other defendants or conspired directly or indirectly with them, or had any understanding with Morei to buy or sell narcotics. There was no community of scheme between him and the other defendants. They shared in no common intent or plan, nor was there any prearrangement or concert of action. Dr. Platt was paid nothing and it is not claimed that he asked for any remuneration or expected to receive anything from the claimed transaction. Accepting the facts as contended for by the prosecution—which are squarely contradicted by the defendant—*the only thing Dr. Platt did was to give Beach the name of Morei as a man from whom he might secure heroin* to dose horses in order to stimulate them in racing. This is not the purposive association with the venture that, under the evidence in this case, brings Dr. Platt within the compass of the crime of selling or purchasing narcotics, either as a principal, aider and abettor, or accessory before the fact." (Italics added).

Petitioner is reputed to have given Cross and Gjertsen the name of Minor as a person from whom they might and did secure drugs, as Dr. Platt was reputed to have done in the *Morei* case. The conviction therefor of Dr. Platt was reversed; the conviction of Petitioner was affirmed.

In the *Morei* case, the court proceeded to point out at page 831:

"If the criticism for holding that one is guilty of procuring the commission of an offense, is that the offense would not have been commited except for such a person's conduct or revelation of information, it would open a vast field of offenses that have never been comprehended within the common law by aiding, abetting, inducing or procuring."

It is respectfully suggested that the Court of Appeals below has rendered a decision in conflict with the decisions of other Courts of Appeals on the same matter and has decided an important question of federal law which has not been, but should be, settled by this Court.

III.

The trial court, in submitting four instructions to the jury on aiding and abetting, sanctioned by the Court of Appeals below by the affirmance of the judgment of conviction, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

At the request of the Government, and over the objections of the defendants, the Court submitted, among others, the following instructions to the jury:

"*Government's Instruction No. 21:* (A. 311)

There is another statute of the United States which reads as follows:

(a) Whoever commits an offense against the United States or aids, abets, counsels, induces, or procures its commission, is punishable as a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is punishable as a principal."

"Government's Instruction No. 23: (A. 312)

You will note that there has been no direct evidence in this case that Jessie Maroy had actual physical possession of narcotics. The Government witnesses have testified only as to physical possession by Edward Minor. Under the Statute which I read to you just a moment ago, it is not necessary that each of the defendants have had possession of the narcotics, but only that one of them had possession while the other aided in the illicit transaction to which that possession was incidental.

Therefore, if you should find from all the evidence and beyond a reasonable doubt that Edward Minor had possession of certain narcotics at the time and under the circumstances alleged in Count I of the indictment, and that Jessie Maroy aided, abetted, counselled, commanded, procured or induced Edward Minor to possess such narcotics, then you are authorized to find the defendant Jessie Maroy guilty on Count I of the indictment."

"Government's Instruction No. 26: (A. 314)

Your attention is again directed to the fact that there is no direct evidence in this case that Jessie Maroy had physical possession of narcotic drugs. However, the Statute which I previously read to you, *i.e.* Sec. 2, Title 18, applies to the offense alleged in Count II of the indictment as well as to the offense alleged in Count I. Therefore, it is not necessary that both Edward Minor and Jessie Maroy have had possession of the narcotics. It is only necessary that one of the defendants had possession while the other aided in the illicit transaction to which that possession was incidental.

Therefore, if you should find from all the evidence and beyond a reasonable doubt that Edward Minor had possession of certain narcotics at the time and under the circumstances alleged in Count II of the indictment, and that Jessie Maroy aided, abetted, counselled, commanded, procured or induced Edward

Minor to possess such narcotics, then you are authorized to find the defendant, Jessie Maroy, guilty on Count II of the indictment."

"Government's Instruction No. 27: (A. 315)

The Court further instructs you that if you believe from all the evidence and beyond a reasonable doubt that the defendant, Jessie Maroy, did aid and abet the defendant Edward Minor in the possession of narcotic drugs as alleged in Count II of the indictment, you are authorized to find said defendants guilty under said Count unless such possession has been explained to your satisfaction; in other words, it is not necessary for the Government to prove that the drugs were unlawfully imported, but possession, or aiding and abetting in the possession of such a narcotic drug places the burden upon the defendant to prove to your satisfaction that they were not unlawfully imported, and that he did not believe them to be unlawfully imported. The law presumes that the narcotics were imported illegally and the burden of rebutting that presumption rests on the defendant or defendants in whose possession they are found."

These instructions were submitted with relation to Counts I and II of the indictment, which respectively charge the defendants with the unlawful purchase and concealment of drugs. The sole evidence presented in support of these allegations is that on May 10, 1956 on Madison Street at Hoyne, Cross stated to Petitioner that he wanted to do some business, whereupon Petitioner stated that he didn't do business with a gray, and that if he, Cross, wanted to do some business to see his man. Petitioner left and was not seen again. Petitioner said nothing to Minor, nor Minor to Petitioner. Subsequent to Petitioner's departure and in his absence, Minor, Cross and Gjertsen engaged in a conversation, after which Cross

and Gjertsen went to a tavern. Minor's whereabouts were not known. Later Minor transferred a package to Cross in the tavern and left the vicinity in a Plymouth automobile. This is the evidence upon which the complained of instructions were given.

Government's instruction number 21 in part reads, "(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is punishable as a principal." There is no evidence in this record that Maroy 'caused an act to be done.' Maroy did not talk to Minor, nor Minor to Maroy at any time from the conversation between Minor, Cross and Gjertsen up to the time, nor after, the transfer of the package to Cross in the tavern. It was therefore error to submit Title 18, Section 2, Subsection B to the jury.

Government's instructions numbers 23 and 26 in part provide: "Therefore, if you should find from all the evidence and beyond a reasonable doubt that Edward Minor had possession of certain narcotics at the time . . . and that Jessie Maroy aided, abetted, counselled, commanded, procured or induced Edward Minor to possess such narcotics, then you are authorized to find the defendant, Jessie Maroy guilty. . . ." There is no evidence that Maroy aided or abetted Minor in the latter's possession of the drugs. *Willsman* v. *United States,* 286 Fed. 852; *Moses* v. *United States,* 220 Fed. (2) 166; *Morei* v. *United States,* 127 Fed. (2) 827.

When, where, how or from whom Minor obtained them is not revealed. Maroy said absolutely nothing to Minor. Maroy did not 'aid, abet, counsel, command, induce or procure,' Minor to do anything. When Cross stated to Maroy that he wanted to do some business, Maroy replied to him that he didn't do business with a gray and that if

he wanted to do business, to see Minor, which Cross subsequently did. This revelation by Maroy to Cross as to a source for Cross is not aid to Minor. Quite the contrary. This information revealed by Maroy to Cross constitutes aiding and abetting Cross in the acquisition of drugs by Cross. The conselling by Maroy was to Cross. It was Cross who was advised and informed, and not Minor. Maroy did not tell Minor to, or how, or when or if to sell drugs to Cross. He said nothing to him. The information was submitted to Cross. It is, therefore, respectfully submitted that there is no evidence upon which said instructions are predicated and the Court erred in submitting them to the jury.

Government Instruction number 20A (A. 309-310) is diametrically opposed to and in conflict with Government's instruction number 23 (A. 312). The former tells the jury that "Before you may find the defendant, Jessie Maroy guilty, . . . *you must believe from all the evidence . . . that* the defendant, *Jessie Maroy, . . . had in his possession the* heroin described in that Count. . . . ** Then by Instruction number 23, (A. 312) the court informs the jury that there was no evidence that Maroy had possession of narcotics, but that, " . . . if you should find from all the evidence . . . that *Minor* had possession of narcotics . . . and that Maroy aided . . . Minor to possess such narcotics, then you are authorized to find the defendant Maroy guilty. . . . " Government instruction number 20 A advises the jury that to find Maroy guilty, Maroy must have had possession of the drugs. Then by Government instruction number 23, the jury is told that Maroy is guilty even though he is not shown to have had possession of the drugs. The former provides that a showing of possession of the drugs by Maroy is required and the latter provides that such showing is not required. This conflict of instruc-

tions is confusing to the jury and prejudicial to the defendant.

Government instruction number 22 (A. 311-312) advises the jury that *prima facie* evidence of a violation of the statute is applicable to " . . . the person in whose possession the narcotic may be found. . . . " Government instruction number 26 (A. 314) then tells the jury that it may expand the presumption beyond the statutory limitation to include Maroy in whose possession the drugs were not found. This conflict of these two instructions is apparent.

B.

THE INSTRUCTIONS ARE REPETITIOUS AND PREJUDICIAL.

It is respectfully submitted that the court erred in submitting four instructions on aiding and abetting. Government's instructions numbers 21, 23, 26, and 27, are duplicitous, repetitious, synonymous and practically identical. Their repetition over-emphasized their contents and literally told and instructed the jury to find Maroy guilty of aiding and abetting Minor. When the quality of the Government's evidence is considered it is readily discernible why it desired the over-emphasis which their repetition created. Their repeated submission to the jury was certainly prejudicial.

The defendant is not entitled to a repetition of instructions on presumption of innocence, burden of proof or reasonable doubt. In *Wilson* v. *United States,* 109 Fed. (2) 895, at page 896, the court stated that, '"It is urged that the court erred in refusing to instruct the jury that in order to find appellant guilty of the alleged conspiracy, the jury would have to find that he entered into the conspiracy 'with intent to injure said bank.' But in the main

charge the court fully and explicitly instructed the jury upon the element of intent and *it was not prejudicial to decline to repeat the instruction.*" (Italics added)

The defendant in *Eierman* v. *United States,* 46 Fed. (2) 46, at page 47, objected because the court failed to repeat the expression 'reasonable doubt' in the court's definition of possession to the jury. The Court of Appeals there held that the jury were clearly instructed as to reasonable doubt elsewhere in the charge and "there is no necessity of reiterating the phrase in every charge".

In *United States* v. *Siden,* 293 Fed. 422, page 429, an instruction was given which read in part, "if you are satisfied it did take place, you should convict him." Objection was made to this instruction because it did not again state that the jury must be satisfied beyond a reasonable doubt. A previous charge had instructed the jury on reasonable doubt and it was held that "the court is not obliged to repeat that phrase in connection with every statement made in its charge."

The Government has no more right to a repetition of instructions favorable to the prosecution than has a defendant to a repetition of instructions favorable to his defense. In *People* v. *White,* 365 Ill. 499, 6 N.E. (2) 1015, page 1023, two instructions on circumstantial evidence, in identical language were given at the People's request, upon which the defendant relied as error. The People contended that one instruction was an original and the other a carbon copy and that their submission was accidental. The court held that "Regardless of what may have brought about this unusual situation, it was error to give duplicate instructions upon that subject.".

During the submission of the instructions by counsel to the Court for the latter's approval, the following colloquy occurred: (A. 288)

"The Court: Yes, Now, 23.

"Mr. Pincham: My objection to that one is it is a duplicate instruction to number 21.

"The Court: You mean aider and abetter?

"Mr. Pincham: Yes, sir, and my further objection is, as I said before, there is no evidence of aiding and abetting.

"The Court: *I think that is laying it on a little too thick, Mr. Grady. I think the court of appeals might say it is repetition and prejudicial. It picks out Section 2 as the aider and abetter statute.* (Italics added)

"Mr. Grady: No, that is not my language.

"The Court: I think it is argumentative. It would be considered prejudicial. I will refuse it, or rather I will sustain the objection.

"Mr. Grady: Most of the language was taken right from the case.

"The Court: Well, I will give it this way: 'Under the statute which I previously read to you, that is Section 2.' I won't say 'aider and abetter.' I will strike that out and will say 'under the statute'. Is that satisfactory?

"Mr. Grady: Yes, that is satisfactory.

"The Court: Then I will give it over your objection, Mr. Pincham.

"Mr. Pincham: All right, Judge fine."

Instruction number 23, was then submitted in the language as before set forth. The court expressed the view that it was repetitious and prejudicial and that the court below might very well look with disfavor upon its repeated submission. The court further anticipated the prejudicial over-emphasis its repetition would influentially create when it stated, "I think that is laying it on a little too thick, • • •". In spite of its apparent biased import, the court not only submitted it, but immediately thereafter submitted two additional ones, *i. e.*, number 26 and 27.

Instruction number 26 provides: "*Your attention is again directed to the fact* that there is no direct evidence in this case that Jessie Maroy had physical possession of narcotic drugs. However, *the statute, which I previously read to you, i. e.,* Section 2 of Title 18, *applies* to the offense alleged in count II of the indictment *as well as to the offense alleged in count I.* * * *" The jury had previously been instructed in Instruction number 23 that there was no evidence that Maroy had physical possession of the drugs and the attention of the jury need not have been "again directed to the fact." It was likewise needless to call to the attention of the jury that the court had previously instructed it on Title 18, Section 2, and certainly it was repetitiously prejudicial to reiterate that said section applied "as well as to the offense alleged in count I." The jury had been so instructed in number 23, and it need not have been repeated in number 26. The import of this language emphasized to the jury that they should find Maroy guilty of aiding Minor in the latter's possession of the drugs.

Instruction number 21, recites the statute on aiding and abetting. The first paragraph of instruction number 23:

> "You will note that there has been no direct evidence in this case that Jessie Maroy had actual physical possession of narcotics. The Government witnesses have testified only as to the physical possession by Edward Minor. Under the statute which I read to you just a moment ago, *it is not necessary that each of the defendants have had possession of the narcotics, but only that one of them had possession while the other aided in the illicit transaction to which that possession was incidental.*" (Italics added)

And of instruction number 26:

> "Your attention is again directed to the fact that there is no direct evidence in this case that Jessie

Maroy had physical possession of narcotic drugs. However, the statute which I previously read to you *i. e.* Section 2 of Title 18, applies to the offense alleged in count II of the indictment as well as to the offense alleged in count I. *Therefore it is not necessary that both Edward Minor and Jessie Maroy have had possession of the narcotics. It is only necessary that one of the defendants had possession while the other aided in the illicit transaction to which that possession was incidental.*" (Italics added.)

And of instruction number 27:

"The court further instructs you that *if you believe* from all the evidence and beyond a reasonable doubt that *the defendant Jessie Maroy did aid and abet the defendant Edward Minor* in the possession of narcotics drugs as alleged in count II of the indictment, you are authorized to find said defendants guilty under said count unless such possession has been explained to your satisfaction • • • ". (Italics added)

Each instruction states the same thing in practically the same language. Their prejudicial influence on the jury is apparent. In *People* v. *White,* 308 Ill. 310, 139 N.E. 58, pages 59-60, the defendants were charge with rape. Their defense was consent. They requested numerous instructions defining "force" in the alleged commission of the act, which were refused on the ground that other given instructions adequately submitted the requested definition. They contended for reversal of their conviction that the refusal of their requested instruction was erroneous. The court held that, "neither the state nor the defense is entitled to a repetition of instructions, *and to restate a proposition of law in different language is but a repetition.* (Italics added.)

In *People* v. *Blumenberg,* 271 Ill. 180, 110 N.E. 788, page 791, the court held that "the practice of asking a great

many instructions, stating substantially the same rule of law in slightly varying forms of expression, serves only to cloud the issues, is confusing to the jury, and imposes unnecessary labor on the court." It is respectfully submitted that instructions number 21, 23, 26 and 27, are restatements of the same legal proposition in slightly varying forms of expression and is but a repetition.

Instruction number 27 proceeds to point to the jury that unless the possession of the drugs has been satisfactorily explained to them they should find the defendants guilty, " in other words, it is not necessary for the government to prove that the drugs were unlawfully imported, but possession or aiding and abetting in the possession, of such narcotic drugs places the burden upon the defendant to prove to your satisfaction that they were not unlawfully imported, * * *" This portion of the instruction duplicates instruction number 24, the preceding portion of which duplicates instructions number 21, 23, and 26. Not only was number 27 erroneously submitted for that reason but for the further reason that no evidentiary support for it is found in the record. Minor offered no explanation for having the drugs in his possession. There is no evidence that Maroy had possession. No evidentiary explanation of the possession of the drug having been offered, the court erred in instructing the jury that the burden of satisfactorily explaining their possession was on the defendants.

The submission of the complained of instructions precluded the defendant from receiving a fair and impartial trial, and their prejudicial import corrupted the entire trial proceeding.

To these complaints made of the instructions the Court of Appeals below merely said, at page 56 of the opinion:

> "The instructions, of which complaint is made, correctly state the law and are not prejudicially repeti-

tious and most certainly did not instruct the jury to find Maroy guilty of aiding and abetting as contended by the defendant-appellant."

IV.

The affirmance of the judgment of conviction of Petitioner of having conspired to violate the narcotic laws of the United States by the Court of Appeals below in the complete absence of any evidentiary support therefor is so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Count Twelve charged the defendants with having conspired to violate the narcotic laws of the United States. In *United States* v. *Silva,* 131 Fed. (2) 247, Mr. Justice Chase stated at page 249 that:

> "There is no magic about a count charging conspiracy. It is simply an accusation of a distinct crime and evidence in support of it must be clear and convincing as to leave no reasonable doubt."

This Court pronounced the dreaded fear and danger to individual liberty in conspiracy prosecutions in *Kotteakos* v. *United States,* 328 U.S. 750, at page 773:

> "When many conspire, they invite mass trial by their conduct. *Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to indivualize each defendant in his relation to the mass.* Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> "Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That

way lies the drift toward totalitarian institutions. *True, this may be inconvenient to prosecution. But our Government is not one of mere convenience or efficiency. It, too, has a stake, with every citizen in his being afforded our historic individual protection, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth.*"

At page 774, the court continues:

"* * * *The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice or denial of substantial rights has not taken place.* * * *" (Italics added)

The evidence in the case at bar falls short of the requisite proof demanded by the *Silva* case and the Government attempts to sustain the conviction of Maroy by transference of Minor's guilt to him, which was denounced in the *Kotteakos* case. There is no evidence contained in this record of any agreement, combination or confederation between the defendants. On May 15, 1956, and May 22, 1956, when Cross stated to Maroy that he wanted to do business, Maroy told him that he did not engage in such activities. Cross then proceeded to confer with Minor. Minor is not shown to have conferred with Maroy after agreeing to obtain drugs for Cross and before his delivery to him. When, from whom,where or how Minor obtained the drugs is not shown, and Maroy is not shown to have participated in any of the aforementioned phases of Minor's acquisition. At the time of the arrest of Maroy by Gjertsen, Maroy had no drugs in his possession. Gjertsen took Maroy to his place of residence and searched same, which search revealed no drugs, implements of dispensing same, nor any incriminating articles or thing. Nor is Maroy

shown to have participated in the proceeds of the sale. The serial numbers of the money used in the transaction of July 5th, were recorded and the money was tested with phosphorescent powder. Agent Gjertsen testified (A. 379) that he furnished the money used by Agent Turnbou. Agent Turnbou testfied that he gave this money to Minor in the Spot Tavern in the early morning of July 6, 1956 (A. 194). Maroy had not been seen by the Agent since on or about May 22, 1956. When Maroy was arrested by Gjertsen, he tested Maroy's money with a blue light for phosphorescent powder to see if Maroy's hands had contacted the money given to Minor by Turnbou. Had he done so, his hands would have transmitted the phosphorescent powder to the money in his possession at the time of his arrest. Obviously Maroy's money contained no such powder, for otherwise, Gjertsen would have so testified. Gjertsen further examined the serial numbers of Maroy's money to determine if any of the bills in his possession were the same bills which Turnbou had given to Minor. He found that they were not and that Maroy had none of these bills in his possession.

At no time did Maroy direct or advise Minor. As a matter of fact, the record is void of any conversation between them. Maroy said nothing to Minor. The evidence concusively reveals that Minor was acting on his own and for his own personal and private gain and that, at best, Maroy had suspected knowledge of his activities.

In *United States* v. *Day*, 41 Fed. (2) 852, the evidence to prove the conspiracy showed that one defendant was engaged in selling whiskey on the east side of a river, opposite a city. Another defendant operated a launch, and frequently bought whiskey from him and charged $2.00 a gallon for bringing the whiskey across the river and delivering it to another defendant, who in turn, sold it at

retail. At the conclusion of the evidence a motion was made for judgment of acquittal because no conspiracy was shown. In granting the motion, the court held, at page 853:

> "The knowledge by one that another is doing, or contemplates the doing of, such act, without any aid or assistance by such one in the doing of the act, does not make a co-conspirator. Nor does the fact that a number of people, each of whom is engaged in the illegal acts, and is so known to be by each of the other, become co-conspirators, unless some aid or assistance be given by one to another in the illegal act done by such other. It is not a community of crime by several that makes them conspirators, but a community of interests in some crime. Many men may be engaged in committing the same sort of crime, each knowing that the others were so engaged, without becoming conspirators."

None of the requisite evidentiary ingredients of a conspiracy is shown by the record; that is, there is no evidence of any agreement by and beween the defendants, of any conduct by Maroy in furtherance of any common design or interest, or any overt act by Maroy, of any conversation by the defendants in furtherance of a common interest; of any participation in the proceeds from Minor's conduct by his alleged co-conspirator, or of any objects of the alleged conspiracy, to wit: drugs, being found in the possession of Maroy.

The Government bases presumptions upon presumptions. It presumes that there was a conspiracy. It presumes that Maroy participated in it, and that Maroy received a gain therefrom. In reversing a conviction under a conspiracy indictment, the court in *Dahly* v. *United States*, 50 Fed. (2) 37, at page 43, stated:

"• • • even participation in the offense which is the object of the conspiracy does not necessarily prove the participant guilty of conspiracy. The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must in addition thereto, be proof of the unlawful agreement and participation therein, with knowledge of the agreement. Presumption cannot be based upon another presumption, but only upon facts."

The expression and conduct attributed to Maroy are subject equally to two interpretations and impressions, one of innocence and one of guilt. When coupled with his version of what transpired, the latter impression and interpretation is completely nullified. (See *Willsman* v. *United States,* 286 Fed. 852)

In *Morei* v. *United States,* 127 Fed. (2) 827, heretofore discussed, Dr. Platt was convicted of conspiracy to sell and purchase drugs. An informer requested heroin from Dr. Platt to soup race horses and gave him the names of the prospective horses for the doctor to bet on. Dr. Platt told the informer that he did not have any heroin, but gave him the name and address of the defendant Morei as a source thereof and told him to tell Morei that the doctor sent him and that, "he will take care of you." This conviction was reversed on the ground that the aforesaid conduct of Dr. Platt was insufficient upon which to convict him of a conspiracy to sell and purchase drugs. Maroy's conduct is analogous to that of Dr. Platt.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES B. EVINS,
Attorney for Petitioner
12 W. Garfield Blvd., Suite 200
DRexel 3-3600
Chicago 9, Illinois

R. EUGENE PINCHAM,
Of Counsel
12 W. Garfield Blvd.
Suite 200
DR. 3-3600
Chicago 9, Illinois

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11954 SEPTEMBER TERM 1957—SEPTEMBER SESSION 1957

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JESSIE MAROY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 17, 1957

Before SCHNACKENBERG, HASTINGS and PARKINSON, *Circuit Judges.*

PARKINSON, *Circuit Judge.* The defendant-appellant, Jessie Maroy, and his co-defendant below, Edward Minor, were jointly tried before a jury for alleged violations of the narcotics laws. The indictment on which they were tried was in three counts, Count one charged a violation of Title 26 U.S.C.A. §4704(a), Count two charged a violation of Title 21 U.S.C.A. §174, and Count twelve charged a conspiracy in violation of Title 18 U.S.C.A. §371. The jury returned a verdict finding both defendants guilty of all three counts and this appeal by the defendant, Jessie Maroy, followed.

The defendant-appellant insists on reversal for the reason (1) "the evidence is insufficient upon which to sustain a finding of guilty of Maroy of having on May 10, 1956 unlawfully purchased or concealed narcotic drugs, or of

having conspired so to do", (2) "there is no evidence in the record that Maroy aided and abetted Minor in the unlawful purchase or concealment of drugs and the Court's instructions thereon are without evidentiary support and their submission was therefore error", and (3) the instructions on aiding and abetting were repetitious and "prejudicially over-emphasized the charge and instructed the jury to find Maroy guilty thereof."

In the consideration of the sufficiency or insufficiency of the evidence to support the verdict of the jury we cannot weigh the evidence or test the credibility of the witnesses. "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *U. S.*, 1942, 315 U.S. 60, 80.

The facts, established by the evidence, viewed in its aspects most favorable to the Government, are that on the afternoon of May 10, 1956, John A. Gjertsen, a Federal Narcotics Agent, and Thomas L. Cross, a special employee of the Narcotics Bureau, were standing together in the vicinity of Hoyne and Madison Streets in Chicago. Cross was a user of heroin. Cross and Gjertsen noticed Maroy, together with his co-defendant, Edward Minor, drive up in a 1956 Pontiac automobile. Maroy was driving and he owned the automobile. Maroy parked his car at the curb on the South side of Madison Street and both Maroy and Minor alighted. Maroy saw Cross and waved to him from across the street. Maroy and Minor then crossed Madison Street to where Cross and Gjertsen were standing and Maroy asked Cross where he had been lately as he hadn't seen him on the streets. Cross replied that following the death of his wife he had moved to the South side of Chicago and, since he had no automobile, he was unable to come to the West side very often. Cross then said to Maroy, "Look, I have got a friend with me." Maroy and Cross then stepped away several paces and Cross said to Maroy, "Look, I have got a friend of mine with me. He wants to put me in business. He don't want to spend much money because he would like to see what I am going to

do first. If I do all right the first time, he said he would do better, you know." Cross told Maroy that he wanted to get "a half piece of stuff", the word "piece" in the narcotics traffic meaning an ounce of heroin, and Maroy replied, "I don't do no business with no grays (meaning Caucasians) anyway. So if you want to talk about it, you have got to see my man." (The record does not so show but counsel for the defendant-appellant informed this court in oral argument that Cross was a negro as were Maroy and Minor and that Gjertsen was a white man.)

Maroy and Cross then rejoined Gjertsen and Minor and Cross introduced Maroy to Gjertsen. Gjertsen told Maroy he wanted "to do some business", which, in the narcotics trade jargon, meant he wanted to buy some heroin, and Maroy replied he wouldn't deal with a gray and if Gjertsen wanted to do business to deal with his man and stated that "his man" was Edward Minor. Maroy then left and walked east on Madison Street. Cross told Minor he wanted to buy "half a piece" and Minor told Cross and Gjertsen to meet him at the bar at Leavitt and Madison Streets. Minor then walked east on Madison Street, the same direction Maroy had gone a few moments earlier. Approximately twenty minutes later, Minor appeared at the bar at Leavitt and Madison and transferred a package containing 200 grains of heroin to Cross and Gjertsen for the sum of $60.00. The package bore no federal tax stamps and the sale was not pursuant to a written order.

On May 22, 1956, Cross was again in the vicinity of Hoyne and Madison Streets in Chicago accompanied by William H. Turnbou, another agent of the Federal Narcotics Bureau. About 4:30 P.M. Maroy and Minor drove up in Maroy's Pontiac. Maroy and Minor got out of the car and Cross went over to Maroy and Minor and told Maroy that he had a friend who "wanted to do some business." A conversation quite similar to the one of May 10, 1956 then took place except Maroy was present throughout and Minor said "Okay. Meet me on Albany and Washington." Minor then got in Maroy's Pontiac and drove to the vicinity of Albany and Washington where he entered

an apartment. Maroy remained on the corner and Cross rejoined Turnbou. Cross and Turnbou drove to Albany and Washington, where they saw Maroy's Pontiac parked. They entered an alley and met Minor. Minor gave Turnbou a package containing 378 grains of heroin and Turnbou paid him $100.00. The package bore no federal tax stamps, nor was the sale pursuant to a written order. Minor then drove Maroy's Pontiac to where Maroy was standing on the corner of Hoyne and Madison. Minor got out of the car and walked over to Maroy. Their hands met and, after a short conversation, they got in Maroy's Pontiac and drove off, with Maroy at the wheel.

About 9:00 P. M. on July 5, 1956, Agent Turnbou had a telephone conversation with Minor. Turnbou told Minor he wanted "to pick up another piece." Minor said, "Okay". They made arrangeemnts to meet at the corner of Hoyne and Madison Streets. Shortly thereafter Maroy and Minor walked out of a building at 111 North Wood Street and proceeded to a parking lot where Maroy's Pontiac was parked. They got into a green Chevrolet and drove directly to Hoyne and Madison with Maroy doing the driving. Turbou was waiting on the corner and Maroy stopped the car east of Hoyne. Minor got out and joined Turnbou. Maroy drove past Minor and Turnbou and disappeared. Thereafter, Minor gave Turnbou a package containing 305 grains of heroin for the sum of $500.00. There were no federal tax stamps on the package and the sale was not pursuant to a written order.

The defendant-appellant contends that there is no evidence that he ever had possession of the heroin. However, the undisputed evidence is that his co-defendant below, Edward Minor, was in his employ, and he was in possession and made the illegal sales to both Gjertsen and Turnbou. The facts are that Cross introduced Maroy to both Gjertsen and Turnbou and when they told him they wanted to buy some heroin he turned them over to his employee, Edward Minor, by whom the illegal delivery was made. We can not say the jury was unwarranted in finding that the defendant-appellant, Jessie Maroy, aided and abetted

Minor in the illegal transaction and they were acting in concert in the illegal undertaking, *U. S.* v. *Chiarelli*, 7 Cir. 1951, 192 F. 2d 528, cert. denied, 342 U.S. 913, and that the possession of the heroin by Minor was possession by Maroy as well. *U. S.* v. *Cohen*, 2 Cir., 1941, 124 F. 2d 164, 165, cert. denied, 315 U.S. 811; *U. S.* v. *Pisano*, 7 Cir., 1951, 193 F. 2d 355. Whether the evidence was sufficient to establish guilt beyond a reasonable doubt, or whether it was equally consistent with innocence or guilt, were matters for the determination of the jury. We hold that there was substantial evidence to support the verdict on all three counts of the indictment and we can not disturb the finding.

The defendant-appellant complains of the trial court giving Government's instrutcions 21, 23, 26 and 27. His objection to instruction 21 was that there was no evidence as to aiding or abetting as to him; to instruction 23 that it was a duplicate of 21; to instruction 26 that he was objecting, though no reason was stated therefor, and to instruction 27 because it was repetitious and that a portion of one sentence "The law presumes that the narcotics were imported illegally", was not an accurate statement of the law because the "law only presumes that when he has possession."

Instruction 21 simply quoted the aiding and abetting statute *ad verbatim*. There was evidence, as we have already pointed out, from which the jury could find that Maroy aided and abetted Minor. There is no merit in defendant's objection to this instruction.

Instruction 23 is a correct statement of the law as applied to Count one of the indictment and is not a duplication of 21 but simply explained to the jury how the statute applied to Count 1 and 26 did the same as to Count 2, and 27 instructed the jury as to the presumption of possession under Title 21 U.S.C.A. §174, but 23, 24 and 27 clearly informed the jury that before they could find the defendant Jessie Maroy guilty under either Count one or Count two they had to first find beyond a reasonable

doubt that he aided and abetted Edward Minor in the possession of the narcotics.

The instructions, of which complaint is made, correctly state the law and are not prejudicially repetitious and most certainly did not instruct the jury to find Maroy guilty of aiding and abetting as contended by the defendant-appellant.

From a careful consideration of the entire record we believe the defendant-appellant was given a fair trial and the jury was properly instructed, without the instructions being prejudicial to him in any manner, and the verdict was supported by substantial evidence.

The judgment is

AFFIRMED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Thursday, October 17, 1957

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. John S. Hastings, Circuit Judge
Hon. W. Lynn Parkinson, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* 11954 v. JESSIE MAROY, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Friday, November 13, 1957

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. John S. Hastings, Circuit Judge
Hon. W. Lynn Parkinson, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JESSIE MAROY, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

11954

It is ordered by the Court that the Petition for a Rehearing of this cause be, and the same is hereby, DENIED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing pages contain a true copy of the Appendix, filed on July 15, 1957, the Opinion of the Court, filed October 17, 1957, the Judgment, entered October 17, 1957, and the order denying Petition for Rehearing, entered November 13, 1957, in Cause No. 11954, United States of America, Plaintiff-Appellee vs. Jessie Maroy, Defendant-Appellant, as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 26th day of November A. D. 1957.

Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.
By: R. Hays Blanchard
Chief Deputy Clerk.

[Seal]